

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Price Cap Regulation of)
Local Exchange Carriers) CC Docket No. 93-179
)
Rate-of-Return Sharing)
and Lower Formula Adjustment)

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OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION
TO EMERGENCY MOTION FOR STAY PENDING JUDICIAL REVIEW

MCI Telecommunications Corporation (MCI), by its undersigned attorneys, hereby opposes the Emergency Motion for Stay Pending Judicial Review of the Commission's "Add-Back Adjustment" Order (Order)^{1/} filed by the Ameritech Operating Companies. As explained below, Ameritech has not met the stringent requirements for a stay of a Commission order, and its request must therefore be denied.

Background

In the Order, the Commission made explicit an implicit requirement of the LEC Price Cap Orders,^{2/} namely, that the calculation of a local exchange carrier's (LEC's) actual rate of return for a given year not be artificially depressed (or

^{1/} Price Cap Regulation of Local Exchange Carriers: Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, FCC 95-133 (released April 14, 1995).

^{2/} Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Price Cap Recon.), aff'd sub nom., National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

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inflated) by the "sharing" obligation (or "low-end" adjustment) resulting from the previous year's earnings. As noted in the Order, failure to remove the impact of a current sharing adjustment for the prior year's earnings from the current year's reported earnings "will make a LEC's [current] earnings, and therefore its productivity, appear to be lower than it actually is...."^{3/}

Any objective, disinterested observer thus would have assumed that the measurement of each year's actual rate of return for sharing purposes ought not to be skewed by the current impact of a sharing refund arising from the previous year's higher than expected earnings. Nevertheless, some of the LECs, including Ameritech, opposed such an approach, arguing that it was not set forth explicitly in the price cap rules. Accordingly, in an excess of caution, the Commission proposed to make explicit the "add-back adjustment" -- the requirement that price cap LECs exclude the effects of sharing and low-end adjustments carried out in the prior year before computing the earnings levels for the prior year that determine required sharing or permitted low-end adjustments for the current year. The Commission explained in its Notice of Proposed Rulemaking that the add-back adjustment "is more consistent with the price cap plan as it was

^{3/} Order at ¶ 23.

adopted."^{4/} After considering comments and replies from over a dozen parties in response to the Notice, the Commission adopted an explicit add-back requirement in the Order.

Ameritech subsequently appealed the Order^{5/} and now seeks a stay from the Commission of the Order pending judicial review. Ameritech argues, in support of its stay request, that it is likely to prevail in its appeal because of "analytical deficiencies" in the Order and because the Order constitutes impermissible retroactive rulemaking. Ameritech also argues that it will suffer irreparable injury unless the Order is stayed and that a stay would not injure other parties and would benefit the public interest. As explained below, however, the main "analytical deficiencies" here are found in Ameritech's motion.

**AMERITECH HAS NOT MET THE REQUIREMENTS
FOR OBTAINING A STAY OF THE COMMISSION'S ORDER**

"On a motion for stay, it is the movant's obligation to justify the... exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Com'n., 772 F.2d 972, 978 (D.C. Cir. 1985). In order to obtain a stay of the Order pending appeal, Ameritech must show that: (1) it is likely to prevail on the merits of the appeal; (2) it will suffer irreparable harm

^{4/} Notice of Proposed Rulemaking, Price Cap Regulation of Local Exchange Carriers, Rate of Return Sharing and Lower Formula Adjustment, 8 FCC Rcd 4415 (1993).

^{5/} Ameritech Operating Companies v. FCC, No. 95-1239 (D.C. Cir. filed April 28, 1995).

absent a stay; (3) others will not be harmed by grant of the stay; and (4) the public interest supports grant of the stay. Washington Metropolitan Area Transit Com'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). See also Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Each of these prerequisites must be met to support the extraordinary relief of a stay. Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 5384, 5385 (1989).

A. Ameritech is Not Likely to Prevail on the Merits

Ameritech argues that the Order is irrational because it analogizes sharing to a refund under rate of return regulation, which is legally invalid in these circumstances, according to Ameritech, because no refund may be ordered without a finding of unlawful earnings. Ameritech goes on to argue that the only legally supportable view of sharing is that it is a forward-looking adjustment to the LEC's productivity offset in order to share unforeseen productivity gains with ratepayers. Under that view of sharing, Ameritech claims, it is arbitrary and capricious for the Commission to require that the effects of sharing -- which Ameritech views as a productivity adjustment -- be ignored in measuring earnings to evaluate the LEC's current productivity performance.

Ameritech's reasoning breaks down at every step. As the Commission observed in the Order, sharing can be analogized to

refunds because both mechanisms are designed to return to ratepayers a portion of the LEC's earnings from the prior year.^{6/} The purpose of sharing and low-end adjustments is to correct for an individual LEC's significant variation from the uniform base productivity factor, resulting in extremely high or low earnings. Sharing and low-end adjustments ensure that the LECs and their ratepayers share the risks and rewards of such productivity variations.^{7/} Ameritech does not explain why the analogy between sharing and refunds should necessarily import all of the legal prerequisites for a refund, including a finding of unlawful earnings. The Order does not say that sharing is a refund, but simply that it operates like a refund.

Moreover, that price cap regulation was intended as an overall departure from rate of return regulation does not undercut the remedial analogy between sharing and refunds. As the Commission pointed out in the Order, the target rate of return was chosen as the benchmark by which efficiency gains would trigger sharing obligations.^{8/} Through such mechanisms as sharing, price cap regulation retains some of the earnings focus of rate of return regulation, but that duality hardly invalidates the Commission's price cap scheme, or the remedial similarity of sharing to refunds.

^{6/} Order at ¶ 32.

^{7/} Id. at ¶ 7.

^{8/} Id. at ¶ 32.

Ameritech's "forward-looking adjustment" argument is equally bogus. As the Commission pointed out in the Order, a sharing adjustment is "forward-looking" insofar as it corrects the past in the future. The need for such correction arises because of past earnings but is carried out in current rates. As the Commission explained, if the impact of that correction for past earnings is not excluded in measuring current earnings, the current earnings would be distorted, thereby distorting the measurement of the LEC's current productivity.^{2/} To illustrate the point, it might be useful to turn to the analogy of a corporation's earnings statement. Typically, in measuring the corporation's "true" economic health, analysts ignore one-time adjustments. Similarly, a sharing adjustment for the prior year is irrelevant to a LEC's actual current productivity. Ameritech's argument that the effects of sharing should not be ignored in calculating current earnings to evaluate productivity thus makes no sense.

Ameritech's retroactive rulemaking argument, citing no authority, is also groundless. There is nothing "retroactive," in any legally meaningful sense, about the adjustment required by the Order. Ameritech does not, and cannot, deny that the only impact of the Order is on future rates. The adjustment may make those future rates lower than they otherwise might have been for some carriers, due to the impact of the adjustment on the

^{2/} Id. at ¶ 41.

measurement of their earnings for the prior year. There is nothing "retroactive," however, about imposing more stringent regulation for the future based on past history. It must be concluded that, based on Ameritech's flimsy showing in its motion, it has no chance of success in its appeal.

B. Ameritech Will Not be Irreparably Harmed in the
Absence of a Stay

In order to demonstrate irreparable harm, the movant is required to demonstrate that "the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time,'...the party seeking injunctive relief must show that '[t]he injury complained of [is] of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.' "^{10/}

Ameritech's claim of injury strikes out on every element. First, Ameritech has made no showing that, in fact, the add-back adjustment will make any difference at all in the access rates it will be filing shortly. It has not demonstrated that the exclusion of the effects of sharing on its 1994 earnings will affect the sharing obligations to be reflected in its 1995 rates. At this point, the threat of injury demonstrated by Ameritech is

^{10/} Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931) and Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)) (emphasis in original).

"theoretical," not "actual."

Second, and more importantly, even if there is some impact on its 1995 rates, Ameritech still has not demonstrated irreparable injury. Under Section 65.600(d)(2) of the Commission's Rules, 47 C.F.R. § 65.600(d)(2), it may make corrections to its reported 1994 earnings next year, which can be reflected in its 1996 access tariff filing.^{11/} Thus, if Ameritech wins on appeal or the Commission for any reason modifies its ruling by next March, the effect of the add-back adjustment on its 1995 rates, if any, can be corrected in its 1996 rates. The threat of injury accordingly is not "'of such imminence that there is a "clear and present" need for equitable relief'" at this time. Ameritech therefore has not made the required showing of immediate irreparable injury.

C. Issuance of a Stay Would Substantially Harm the Legitimate Interests of Other Parties and the Public Interest

To obtain a stay, Ameritech must also demonstrate that other parties will not be harmed and that the public interest supports the stay. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." Virginia Petroleum Jobbers, 259 F.2d at 925. Assuming that the

^{11/} LEC Price Cap Recon., 6 FCC Rcd at 2689, ¶¶ 114-15.

effect of the add-back adjustment would be to reduce 1995 access rates, a stay of the Order would force ratepayers to incur higher access rates. Even if the impact of such a stay on access rates could be reversed in a future rate filing, the damage would have been done, in terms of higher access rates filtering through the economy and stunted demand. Accordingly, the public at large would be harmed by a stay, and, thus, by definition, the public interest would also be harmed.

Moreover, Ameritech is incorrect in characterizing the Order as imposing a "new methodology for calculation of the annual adjustments," carrying "dramatic and damaging consequences for" LECs. As noted in the Order, refunds under rate of return regulation were excluded from consideration in measuring each year's actual earnings, and it was natural to assume that a similar earnings measurement approach would be taken with regard to the analogous sharing adjustments under price caps.^{12/} The add-back adjustment "ensures that the earnings thresholds applied to determine price cap LECs' sharing obligations are those [the Commission] intended when [the Commission] adopted these mechanisms."^{13/} The Commission thus found that the "add-back requirement is not only fully consistent with, but also an essential element of, the system of price cap regulation that we

^{12/} Order at ¶¶ 23, 32.

^{13/} Id. at ¶ 22.

adopted for LECs in 1990."^{14/} The LECs' resistance to such an approach does not alter the logical expectation that such an approach would be followed. Ameritech's affected surprise thus cannot be taken seriously in assessing the public interest and balance of harms criteria.

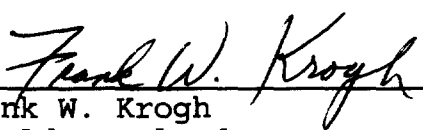
CONCLUSION

For the reasons stated above, Ameritech has not demonstrated any of the elements required for a stay of the Commission's Order. Its Expedited Motion for Stay Pending Judicial Review should therefore be denied.

Respectfully submitted,

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Dated: May 5, 1995

^{14/} Id. at ¶ 32.

CERTIFICATE OF SERVICE

I, Hilary Soldati, do hereby certify that the foregoing
"OPPOSITION TO EMERGENCY MOTION FOR STAY PENDING JUDICIAL REVIEW"
was served this 5th day of May, 1995, by first-class mail,
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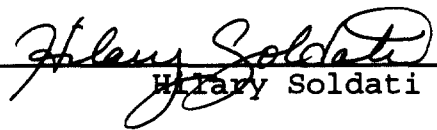
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